

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1308

To be argued by
FREDERICK T. DAVIS

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1308

UNITED STATES OF AMERICA,

Appellee,

—v.—

EUGENE COREY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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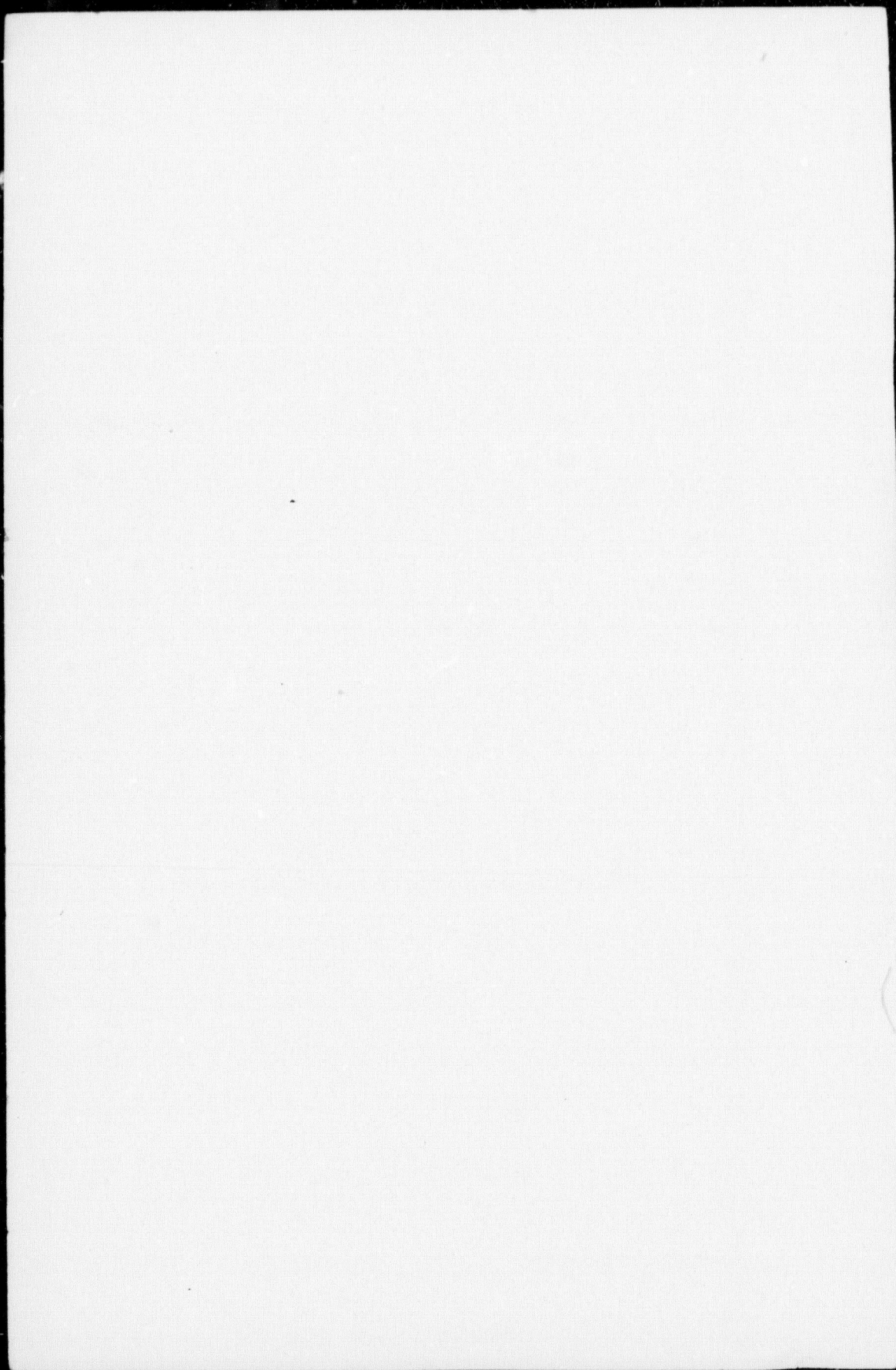


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EUGENE COREY,

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Eugene Corey appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on July 1, 1977, following a five-day trial before the Honorable Constance Baker Motley, United States District Judge, and a jury.

Indictment 77 Cr. was filed on January 27, 1977, charging the defendant Corey, in three counts, with wire fraud, mail fraud and conspiracy in violation of Sections 1343, 1341 and 371, Title 18, United States Code.*

* The Indictment, originally in seven counts, also charged George Barney (Counts 3 & 4) and Donald H. Krasner (Counts 5 & 6) with similar crimes. Barney and Krasner were severed before trial, testified against Corey, and later pleaded guilty to two and one felony counts respectively. Krasner was subsequently sentenced to probation, and Barney has yet to be sentenced. Corey was named as a defendant only in Counts 1, 2 and 7.

The trial commenced on May 31, 1977, and on June 7, 1977, the jury returned a verdict against Corey of guilty on all counts.

On July 1, 1977, the Court imposed a sentence of one year imprisonment upon Corey. He is presently at large on bail pending the outcome of this appeal.*

The Government's Case

Statement of Facts

A. Synopsis

From 1965 until 1976, Eugene Corey, the vice-president in charge of data processing for Hartz Mountain, Inc. ("Hartz"), solicited and accepted cash kickbacks from suppliers of business forms in return for causing Hartz to place orders with these select suppliers. Not satisfied with these kickbacks, Corey encouraged the corrupt suppliers to bill Hartz for more supplies than were actually delivered, and even to send bills when there was no shipment at all.

By means of these kickbacks and "short shipments," Corey received more than \$100,000 over the period of the conspiracy.

* The District Court ordered Corey to surrender to commence serving his one year sentence ten days after the mandate of this Court issues, in the event of an affirmance of the judgment of conviction.

B. The "Tab Forms" Transactions

Corey had been employed by Hartz since 1963 and, as vice-president of data processing, controlled purchasing of paper products, magnetic tapes and other supplies used in the computers. By signing each individual invoice, Corey assured payment to the suppliers. (Tr. 295).*

In 1965, Corey requested money from George J. Barney, the president and founder of Tabulating Forms, Inc. ("Tab Forms"), in return for sales of supplies to the data processing division of Hartz Mountain.** Barney agreed to kick back 5% of the gross amount billed, excluding freight charges and taxes, on any future sale to Hartz Mountain. (Tr. 68). This conversation took place in Corey's office at Hartz Mountain. (Tr. 63-65, 68). Once Barney was paid by Hartz,** Barney would draw a check against Tab Forms, charge it to "expenses", cash the check, and deliver the cash to Corey. (Tr. 67). The 5% kickback rate continued until 1967, when Corey told Barney that he wasn't getting enough and Barney agreed to increase the rate to 10%.*** (Tr. 68-70).

* "Tr." refers to pages in the trial transcript.

** At the time, Hartz Mountain, a manufacturer and distributor of pet supplies and accessories, was located at 50 Cooper Square in Manhattan. The company moved in 1972 to Harrison, New Jersey. (Tr. 25-26).

*** Forms' forte was 24-hour delivery, for which it charged a premium of 3 to 10 times the marginal cost for similar items. The exact cost was negotiated at the time the order was placed and accepted. This system allowed ample room for Barney to include the amount of the kickback in the cost of the goods. (Tr. 70).

**** The cash would be delivered first at Corey's office at Hartz Mountain on Cooper Square, then at the Harrison, New Jersey, location, and finally on weekends in a parking lot opposite the Scarsdale railroad station in New York. (Tr. 67, 76-81, 93). These meetings occurred on the average of 8 or 9 times a year and the kickbacks were paid from 1965 until 1976. (Tr. 66, 78-79). During this period Tab Forms received payments from Hartz Mountain of slightly under \$300,000, of which Barney delivered at least \$60,000 in cash to Corey. (Tr. 125, 158-60).

In 1973, Barney complained to Corey that a shortage of raw material had resulted in cost increases and he would be required to raise his charges. Corey discouraged this, saying that Hartz Mountain would not stand for increased costs, and suggested short shipments. Thereafter, Tab Forms billed for 30% more goods than it actually shipped to Hartz Mountain. (Tr. 79-82). Late in 1974, Corey told Barney that another supplier who was paying kickbacks was shorting his shipments in larger amounts than Barney and, thereafter, Tab Forms increased the shortage of materials against billing to 50-60%. (Tr. 84-85). Corey then used the increase in the size of the shortages to increase the size of kickback. In 1973, Corey complained about the cash he was getting in relation to the larger shortages and the amount was increased to 15%. In 1975, after similar complaints, it was increased to 20%. (Tr. 85-87).*

Through June 1976, after Corey retired to Florida, Barney continued to pay kickbacks due to Corey on orders placed while he was at Hartz Mountain. (Tr. 102-08); GX 21).**

C. The "Nomac" Transactions

In the early 1970's, Barney and two of his employees formed a "shell" company, Nomac Industries, Inc. ("Nomac").*** In 1972, Barney suggested to Corey that Nomac

* These payments were computed on the gross amount without regard for the actual size of the shipment. (Tr. 85). At this time, the payment ranged from \$250 to \$3000. Upon receiving \$250 in cash at the Scarsdale station, Corey remarked, with a laugh, it was hardly worth the trip. (Tr. 94-95).

** "GX" refers to government exhibits in evidence at the trial.

*** The employees were J. Nolan and Jim McDonald, thus "Nomac." The company had no office. Its mailing address was the residence of one of Barney's employees. It was capitalized at \$300. (Tr. 117-18).

might be used for billing to disguise the fact that so much Hartz business was going through Tab Forms. In response, Corey suggested that Nomac simply bill Hartz Mountain for magnetic tapes, without even bothering to deliver that product. For his part in this swindle, Corey received 1/3 of all Hartz payments to Nomac, in cash. (Tr. 120).

Corey signed the bill of lading himself at a Scarsdale meeting and Barney then submitted a copy of the bill of lading with an invoice. (Tr. 121; GX 7a-g).^{*} This resulted in payments amounting to \$28,000 by Hartz Mountain for goods they never received.

D. The "Commercial Forms" and "Rensark" Transactions

In 1972, Donald H. Krasner started his own company, Commercial Forms, Inc. ("Commercial Forms"), a jobber or broker of business forms. Krasner approached Corey to obtain Hartz business for Commercial Forms. True to form, Corey agreed to do business with Krasner if there was cash in it for him. After some negotiation, Krasner agreed to pay Corey in cash in the range of \$2.50-\$4.50 per 1000 items ordered by Hartz. (Tr. 172-80).^{**} In November 1972, Krasner formed a second company, Rensark Systems, Inc. ("Rensark"). Hartz orders were placed with this company by Corey and

^{*} GX 7f is an invoice for paper goods other than magnetic tapes but apparently no paper was supplied to match this payment. (Tr. 122-23).

^{**} Krasner had no manufacturing capability himself but would place orders for the goods. Once received, he would compute the kickback as well as his markup on the manufacturer's invoice and based on these figures he would bill Hartz Mountain. (Tr. 180-81). These documents were seized at the time of Krasner's arrest and corroborate his testimony. (Tr. 285-91).

kickbacks, computed in the same manner, were paid to Corey in cash. (Tr. 184-85).

As he had done with Tab Forms, in the Spring of 1972 Corey protested to Krasner that he was not receiving enough money and the computation of the kickbacks was changed to 10-15% of the total order. (Tr. 183). This continued until May 1973, when Corey again complained he was not receiving enough. When Krasner countered he could not get any more cash out of his business, Corey suggested that Krasner also short-ship Hartz Mountain. (Tr. 186-87). It was agreed that Krasner would pay 1/3 of the amount received for goods not shipped to Corey by check made payable to Data Con Co. ("Data Con"), a shell company formed by Corey and his wife. (Tr. 394). Beginning in May or June, 1973 and continuing until April 1976, Krasner through Commercial Forms and Rensark did short-ship and pay Data Con as agreed. The checks to Data Con were delivered to Corey or mailed to his Scarsdale address. (Tr. 190, 197, 278-80; GX 30a-y).

During the period Krasner dealt with Corey, it was made clear to him there would be no new Hartz Mountain orders until Corey had been paid up to date. (Tr. 194-95). Krasner continued to pay Corey after he retired to Florida on orders placed by Corey. (Tr. 195-96). He paid Corey \$20,000 to \$25,000 in cash in this manner. (Tr. 235).

E. The Use of the Mails and the Telephone

The invoices from and the checks to Tab Forms, Nomac, Commercial Forms and Rensark were routinely sent by mail. (Tr. 66, 181, 191). Meetings between Corey and Barney, and Corey and Krasner, were arranged by the parties by telephone. (Tr. 67, 73-80, 196).

The Defense Case

Corey testified on his own behalf. He denied knowledge of the shortage in shipments to Hartz Mountain and Corey denied any knowledge of cash payments. (Tr. 388-89, 400). He admitted meeting Barney at the Scarsdale railroad station but claimed these meetings were to deliver "proofs" of invoices that were needed in a hurry. (Tr. 392). As for the Krasner checks payable to Data Con, Corey claimed these payments to Data Con were for consulting work. (Tr. 394). By way of explanation for the disproportionate amount of purchases made by his department, Corey stated he was away from the office traveling part of the year and that, in ordering supplies, he depended upon his subordinates. (Tr. 385-86).

On cross examination Corey admitted that he was fired by CBS because he overstated his overtime and falsified his employee tax form ("W2") by removing his salary card from the Remington card computer. (Tr. 478).

On direct, Corey admitted that while he was working for Hartz Mountain he used the company computers to perform work for an unrelated company, Record Processing Corp. Corey billed and was paid \$14,700 through Data Con for this work. (Tr. 455-57). However, he contended that the use of the computers was authorized by Leonard Stern, president of Hartz. (Tr. 395). In rebuttal, the Government called Stern, who emphatically denied that he had ever given such authorization. (Tr. 498-500).

ARGUMENT

POINT I

Corey Was Not Denied a Fair Trial.

Corey's principal point appears to be that various actions of the prosecutor deprived him of a fair trial. Each of the claims he now presents to this Court was also made to the District Court; in each instance they were rejected, in some instances after considerable deliberation and the presentation of a memorandum of law, for reasons specifically stated on the record. Corey's present challenge to the trial court's conclusions in this regard are simply without basis. In order to understand the propriety of the conduct under review, however, each claim must be seen in its proper factual context.

Corey argues first and most vociferously that the trial court erred in allowing the Government to cross examine him about fraudulent activities he had committed when in the employ of the Columbia Broadcasting System ("CBS").

As indicated in the statement of facts, the Government's case demonstrated that while at Hartz Mountain Corey had arranged for short-shipments and deliberate overbilling, and had shared with his co-schemers an ever-growing percentage of the surplus. When Corey testified, his defense consisted of an insistence that the overbillings by Krasner and Barney were accomplished without his knowledge, since he relied upon his lieutenants to inform him of the department's needs and the receipt of goods.*

* This defense had been foreshadowed, in part, during the Government's case. Corey, for example, attempted to demonstrate that activities such as the receipt and inventory of the short-shipments from Krasner and Barney were physically remote from him and thus beyond his knowledge (Tr. 328-30); indeed, Bishop,

[Footnote continued on following page]

(Tr. 388). Corey stated that he never took physical inventory of the \$500,000 in supplies he had ordered. (Tr. 388-89). While he acknowledged that the signatures on orders authorizing payments of what he conceded were overbillings by Krasner and Barney were his own, he testified that he signed so many documents of that nature that he was unable to keep track of the significance of each of them, but rather relied on his underlings. (Tr. 401-02). In short, Corey admitted most of the demonstrated, physical facts, but based his defense upon a lack of guilty knowledge.*

Corey's successor, was questioned in such a way to suggest that a person in that position would not be involved in the "physical work" on the inventory control. (Tr. 330). In addition, Corey elicited that Hartz's operation was "mushrooming" (Tr. 58) at such a rate that control over day-to-day operations was impossible, and that the receiving department had primary control and knowledge of the short shipments (Tr. 47-54).

* The following suffices as a typical example of how Corey, through the device of responding to leading questions on direct examination, presented his defense of lack of knowledge:

Q. [Mr. Anolik] You didn't go down and take a physical inventory, did you?

A. [Mr. Corey] No.

Q. As a matter of fact, you relied on your subordinates; would that be fair to say?

A. Yes.

Q. And if your men reported that you did get the merchandise, what would your next function be... approve it?

A. Sign it okay, put it in an interoffice envelope and send it back to accounts payable. Actually the proof of the pudding of whether we had it or not is whether we had it. Otherwise we would run out.

Q. You heard testimony by Mr. Barney, for example, when he said that he was short shipping the company.

Do you remember that?

A. Yes.

Q. Did you have any knowledge of that whatsoever?

A. Absolutely not.

Q. Did it ever come to your attention prior to the time

[Footnote continued on following page]

In the face of this defense, the Government sought and received permission to question Corey about the fact that during the course of the job he had held just prior to joining Hartz Mountain, he had falsified the amount of his overtime, had also falsified his W-2 form, and in this manner pocketed unearned pay. When so questioned, Corey admitted committing the acts, stating only that when the fraud was discovered he paid back the amount of money he owed. (Tr. 477-79).*

The District Court's decision to allow the cross-examination was entirely correct. First, it cannot be seriously disputed that the CBS matter was a "similar act" of enormous probative value.** Corey had, in the most specific terms, isolated his knowledge as the key factual element in the eyes of the jurors. In that context, it was

that this indictment came down or within that area we are talking about when you learned that Mr. Barney was doing these things?

A. No, I didn't know anything about this.

Q. Was there any way that you routinely physically took account of the contents of any particular box?

A. No.

Q. You heard testimony by Mr. Bishop, did you not, that after you left he physically counted the contents of certain boxes; do you remember that?

A. Yes.

Q. Did you ever have occasion to do that?

A. No.

Did you ever have any reason to do it?

A. No.

Q. Was that normal as a matter of fact that you would do it?

A. No.

(Tr. 388-89).

* The entire matter on cross-examination consumed two pages of the transcript.

** While the point was not presented to the District Court, the CBS fraud was clearly also a "bad act" affecting Corey's credibility, and thus the questioning was also proper under F.R. Evid. 608(b).

of considerable importance for them to be informed that in the job he had held just prior to that at Hartz Mountain, he had similarly developed a scheme to bilk his employer of unearned pay—a fact which, if admitted, would be entirely inconsistent with his protestation of lack of knowledge. As such, the matter was a classic example of an admissible prior similar act. As this Court has noted:

“Other crimes evidence is admissible on the Government’s case in chief unless introduced *solely* to show the defendant’s criminal character, provided that its probative worth outweighs its potential prejudice.” *United States v. Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975) (emphasis in original).

See also *United States v. Braunig*, 553 F.2d 777, 781 (2d Cir.), *cert. denied*, — U.S. —, 97 S. Ct. 2686 (June 6, 1977); *United States v. Magnano*, 543 F.2d 431 (2d Cir. 1976), *cert. denied*, — U.S. —, 97 S. Ct. 1101 (Feb. 22, 1977); *United States v. Payden*, 536 F.2d 541 (2d Cir. 1976); *United States v. Natale*, 526 F.2d 1160 (2d Cir. 1975). Indeed, this case surely follows *a fortiori* from numerous cases in this Court where similar acts have been found admissible to demonstrate knowledge or absence of mistake. See, *e.g.*, *United States v. Nemes*, 555 F.2d 51, 52

* In his brief, Corey rather coyly states that the evidence was inadmissible because “[t]here was no issue of motive, identity, intent, and so forth. The issue boiled down to one of credibility.” Brief at 26 (Emphasis added). The elliptical “and so forth” neglects to include the catalog of permissible uses of similar acts provided by the Federal Rules of Evidence, which states that such acts may be used to demonstrate “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” F.R. Evid. 404(b) (Emphasis added). A clearer case of a defense based upon lack of knowledge and mistake or accident could not be imagined.

(2d Cir. 1977); *United States v. Chestnut*, 533 F.2d 40, 49-50 (2d Cir.), *cert. denied*, — U.S. —, 97 S. Ct. 88 (Oct. 4, 1976); *United States v. Miller*, 478 F.2d 1315, 1318 (2d Cir.), *cert. denied*, 414 U.S. 851 (1973). Similarly, while Corey now claims that the acts were not sufficiently similar to those for which he was charged, that is simply not so. As this Court has emphasized, the pertinent question is the similarity of the conduct, not the identity of the crimes committed. *United States v. Santiago*, 528 F.2d 1130, 1134 (2d Cir. 1976); *United States v. Kaufman*, 453 F.2d 306, 310-11 (2d Cir. 1971). In this case, where Corey had first bilked CBS into paying unearned overtime pay by falsifying records and then gone on and bilked his next employer by inducing others to falsify records, the requisite similarity was more than reached. See, e.g., *United States v. Cyphers*, 556 F.2d 630, 634, n. 2 (2d Cir. 1977); *United States v. Erb*, 543 F.2d 438, 442 (2d Cir.), *cert. denied*, — U.S. —, 97 S. Ct. 493 (Nov. 29, 1976).

Corey's final claim that the evidence was inadmissible rests upon his repeated assertion that the matter occurred "16 years earlier," Brief at 22, see also Brief at 3 ("17 years earlier"); 6, 7, 8, 25. This claim misconstrues both the facts and the law. While the elements of the CBS fraud to which Corey admitted occurred 17 years prior to *trial*, they occurred only five years prior to the beginnings of his fraudulent dealings with Barney, and within seven years of the date when the conspiracy was formally alleged to have commenced. In addition, of course, the CBS fraud was discovered in February 1960, and his dismissal on that account led directly to his being hired by Hartz one month later. When viewed in this context, the remoteness of the evidence was far less than that claimed by Corey, and than that sanctioned by this Court in other cases. See, e.g., *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, — U.S. —, 97 S. Ct. 1101 (Feb. 22, 1977); see also *United States v.*

Lewis, 423 F.2d 457 (8th Cir. 1970), *cert. denied*, 400 U.S. 905 (1971); *United States v. Vaughn*, 493 F.2d 441 (5th Cir. 1974).*

The final facet of this aspect of Corey's claim is his assertion that he was somehow "surprised" by the elicitation of the CBS matter on cross-examination, and that he was thus subjected to "trial by ambush." Neither the facts nor the precedent upon which he relies aids him in this claim. The record reveals that no formal or recorded request was made by Corey for the CBS information or for anything other than the record of his previous convictions, which was duly furnished him.** Indeed, this case

* While this Court's opinion in *Magnano* notes that the prior similar acts preceded the acts underlying the indictment by "several years," *id.* at 435, the record and briefs in the case indicate that the gap was more than thirteen years, a fact vociferously emphasized by the appellants in that case.

** There appeared to be something of a dispute about this between Corey's trial attorney and the Assistant United States Attorney trying the case. Although his recollection on the matter seemed to vary, at certain times Mr. Anolik, Corey's attorney, appeared to take the position that he had been assumed that Corey would not be cross-examined about any previous wrongdoing. (Tr. 438). It should be noted that to the extent that there was a difference of recollection, that of the Assistant was repeated, under oath, in the most explicit terms in a post-trial affidavit in response to a post-trial motion by Corey. Affidavit of John P. Cooney, Jr., dated June 27, 1977, at ¶ 3-4. In contrast, the statements of Mr. Anolik at the time of the colloquy were vague and contradictory; for example, while he first gave a version of the facts clearly different from that of Mr. Cooney, he ultimately appeared to conclude that their recollections were the same. (Tr. 451). In addition, Mr. Anolik appeared to concede that any misimpression he may have had rested upon the imprecision of the defendant's inquiries of the Government. As Mr. Anolik said, "...maybe I was not articulate enough to pin point it... If for any reason I was not as articulate, I got a negative answer... it is true he, now as I recall, he had never been convicted... maybe I didn't articulate myself properly..." (Tr. 442, 446).

is wholly unlike this Court's decision in *United States v. Baum*, 482 F.2d 1325 (2d Cir. 1973), upon which Corey principally relies. In *Baum*, a one-day case involving possession of stolen merchandise, the Government introduced in its direct case testimony of a prior similar act, even though the defendant had requested and been denied a formal list of witnesses. When faced with the new and unanticipated witness, defense counsel requested a short adjournment; this was denied by the trial judge on the ground that since the defense had the witness's "rap sheet," it was fully armed for cross-examination. This Court held simply that in view of the importance of the matter in establishing the Government's direct case, a short continuance should have been granted. Here, by contrast, the witness was the defendant himself. Corey was presumably fully aware of the CBS matter—he promptly admitted it when asked (Tr. 471-79)—and could have conferred with counsel about it;* indeed, the prosecutor stated both at the trial (Tr. 444-45) and in his post-trial affidavit, Cooney affidavit at ¶ 4, that he had specifically warned counsel for Corey that cross-examination of his client "would be most heated" and suggested that he discuss possible matters of cross examination with his client. Thus, the defendant had the best witness to the transactions—himself—immediately

* Judge Motley, in her ruling on this issue, specifically found that "this was something that would have been in the knowledge of the defendant, and which he probably should have disclosed to you [defense counsel] when you questioned him about taking the witness stand." (Tr. 466). In addition, Corey asked for—and received—permission to postpone the matter until after lunch to allow time to confer with counsel. (Tr. 461-62).

available.* In short, this Court's decision in *Baum* does not help Corey.**

Finally, in determining whether the trial court's ruling on the CBS matter deprived Corey of a fair trial, this Court's ambit of review is exceedingly small. As this Court has noted with reference to the admission of a similar act,

"In any case, the weighing of the probative value of the evidence against its potentially prejudicial effect is primarily for the trial judge who has a feel for the effect of the introduction of this type

* In his brief on appeal, Corey attempts to bring himself within the ambit of *Baum* by stating that he requested a continuance. When viewed in context, however, it is clear that Corey's counsel was not, as a practical matter, making a real request for a continuance; rather, he was attempting to persuade the trial judge that the matter came as a surprise to him. (Tr. 450). This was underscored by the fact that Judge Motley on two occasions took lengthy recesses with respect to her ruling on the CBS matter, and did not rule on it until after a lunch break, at which time counsel for Corey indicated that he was ready to proceed. (Tr. 466). Finally, any claim that Corey needed a continuance to investigate the question not only falls flat in the face of his ready admission of having committed the fraud (Tr. 477-79), but is also refuted by the fact that in his post trial motion papers and in his brief to this Court Corey has not suggested one fact that he would have or has discovered about the CBS matter had he had a continuance. In short, the request for a continuance was rhetoric and did not, as in *Baum*, reflect any actual need to gain information about a surprise witness.

** Furthermore, of course, this Court has long noted that the Government is under no obligation stemming from *Brady v. Maryland*, 373 U.S. 83 (1963), to bring to the defendant's attention matters already known to him. *United States v. Robinson*, Dkt. No. 76-1153, slip op. 5021, 5040-41 (2d Cir. July 27, 1977) (*en banc*); *United States v. Stewart*, 513 F.2d 957, 960 (2d Cir. 1975), and cases cited therein. Since in this case Judge Motley explicitly found that the CBS matter was one the defendant would be expected to know, it surely follows that the Government was not under any obligation to bring it to his attention.

of evidence that an appellate court, working from a written record, simply cannot obtain. We said in *United States v. Ravich*, 421 F.2d 1203-04 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970), citing *Cotton v. United States*, 361 F.2d 673, 676 (8th Cir. 1966); and *Wangrow v. United States*, 399 F.2d 106, 115 (8th Cir.), *cert. denied*, 393 U.S. 933 (1968), that 'his determination will rarely be reversed on appeal.'"

United States v. Leonard, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). See also *United States v. Rosenwasser*, 550 F.2d 806, 809 (2d Cir. 1977); *United States v. Robinson*, Dkt. No. 76-1153, slip op. 5021, 5036 (2d Cir., July 27, 1977) (en banc) (review of a determination that probative value outweighs prejudice will only lie if the action is "arbitrary" or "irrational"). Judge Motley could hardly be said to have acted either arbitrarily or irrationally: the matter arose only after the defendant had actually testified, and the precise context of both the Government's and the defense cases was before her;* she heard lengthy discussion of the matter and had before her the first-hand accounts of what had transpired out of court; she took two recesses to consider the question, including reading a memorandum of law; she then stated in some detail and at some length her reasons for her actions (Tr. 464-66); and finally she delivered a careful, complete limiting instruction to the jury, as to which absolutely no objection was voiced. (Tr. 467-69). In short, the District Court completely protected Corey's right to a fair trial.

* As this Court has noted, it is wise to withhold the admission of similar act evidence "until after the presentation of the defendant's case when there [is] a better opportunity to appraise the prosecution's need for it." *United States v. Leonard*, *supra*, 524 F.2d at 1092; *United States v. Kaufman*, *supra*, 453 F.2d at 311.

Corey's remaining claims of prejudice are even more frivolous. He claims that the prosecutor erroneously introduced the fact that Corey had changed his name from Cohen in order to make him appear "Jewish" before the jury. Whatever taste (or lack thereof) inheres in the claim on appeal, such a gambit would obviously have been folly, and was simply not contemplated by the prosecutor (who, as Corey notes in his brief at 25, was an experienced one). As appears from the context of the colloquy on the matter (Tr. 471-74) and from the post-trial affidavit of the prosecutor, Cooney affidavit at ¶ 7, the question was based solely upon the reasonable (albeit erroneous) surmise that Corey's name change was "catalyzed by his wrong-doing at CBS." Despite the dryness of that particular well, Corey lost no time in exploiting it for all its was worth. Even though the prosecutor offered to drop the issue as soon as Corey had explained the facts at side-bar (Tr. 472-74), Corey's attorney joined the Court in determining that the entire matter should be explained to the jury.* Corey then stated at some length and in emotional detail that the change was the result of religious intolerance to which he had been subjected (Tr. 476); lest the point had not been sufficiently made, on redirect examination Corey returned to issue, informing the jury, among other things, that his daughter did not know that his son was adopted and of other family matters. (Tr. 481). In short, the entire matter served only to allow Corey to present himself in the most favorable and sympathetic light, an event of which his attorney made ample use in summation. (Tr. 616). The claim on appeal is wholly meritless.

* In his Brief, Corey's recitation of these facts states "[t]he Court could not let the matter drop..." Brief 19. If this was intended to suggest that the full-blown discussion of the matter was against Corey's wishes, the record is to the contrary. When Judge Motley indicated that the entire question should be explained to the jurors, Corey's attorney stated "I agree... Quite true. I think so, your honor." (Tr. 475).

Finally, Corey claims that the prosecutor committed reversible error during his redirect examination of its rebuttal witness, Leonard Stern. In making this argument, Corey simply misstates the record.

Leonard Stern was called by the prosecutor for the sole and simple purpose of refuting Corey's explicit and erroneous statement that he had Stern's permission to make personal use of the Hartz Mountain computers for RPC business. (Tr. 395, 457-58). Stern's exceedingly brief direct examination was concerned solely with this matter. (Tr. 498-500). On cross examination, Corey's attorney went far beyond the scope of direct examination, and propounded several questions—each specifically directed to the period of time before Corey's fraud was discovered—designed to elicit a favorable view of Corey's character and "loyalty." (Tr. 504-05). On re-direct examination (Tr. 505-07) and later on re-re-direct (Tr. 508-09), the prosecutor merely established that Stern's favorable impression of Corey was only during the period when the fraud was unknown; once the fraud became known to Stern, his opinion of Corey changed. (Tr. 508).

How Corey can complain of this is mystifying. His apparent wish is that he be allowed with impunity to create a wholly false impression of himself before the jury. Obviously, the opinion of his supervisors at a time when they were in blissful ignorance of Corey's actual activities is of insignificant relevance; equally obviously, the carefully contrived inquiry opened the door for the Government to elicit the true facts, as this Court has found in other contexts.* See, *e.g.*, *United States v. Canniff*, 521 F.2d 565, 570 (2d Cir.), *cert. denied* sub

*In a portion of the transcript reproduced in neither the appendix nor Corey's brief, the Court explicitly stated that Corey had "opened the door" to the inquiry. (Tr. 511).

nom. *Benigno v. United States*, 423 U.S. 1059 (1975). In short, absolutely no impropriety occurred.*

POINT II

Corey Was Properly Convicted of Federal Crimes.

Corey claims that he was not properly charged with federal crimes because the fraud "should have been left to prosecution by State agencies." Brief at 27. This claim, raised for the first time after trial, is meritless.

As this Court has noted, the elements necessary to show a violation of the mail fraud statute, 18 U.S.C. § 1341, are simply that the defendant participated in a scheme or artifice to defraud and that "the participants in the scheme caused the mails to be used in furtherance

* In the portion of his statement of facts summarizing Stern's testimony, Corey adverts only to Stern's last statement concerning his belief in Corey's honesty and his attorney's request for a mistrial. Brief at 20. In his argument, Corey then states that "the Government [called the] witness for the obvious purpose of eliciting such an opinion." Brief 25. Since, as noted, Stern's entire direct examination consisted of denying Corey's testimony that Stern had approved the side-use of computers, and since the entire area of Stern's opinion of Corey's honesty was opened by *Corey*, nothing could be further from the truth than this statement.

In *United States v. Morgan*, 554 F.2d 31 (2d Cir. 1977), this Court recently indicated that it was improper—although not, in the context of that case, reversible error—for a prosecutor during cross examination of a character witness to ask him if his opinion would have changed had he known the facts adduced at trial. See also *id.* at 34 (Mansfield, J., concurring). This case, of course, is wholly different. First, it was the defense who decided to enter the area in the first place, and thus opened the door to the re-direct examination. Second, and more particularly, *Morgan* involved a witness who was called purely as a character witness and did not know anything about the facts adduced at trial. Stern, by contrast, was called solely because he *did* know about the facts adduced at trial, and thus it was wholly proper—once the defense opened the door—to question him about his reaction to those facts.

of that scheme." *United States v. Cyphers*, 556 F.2d 630, 632 (2d Cir. 1977); *United States v. Finkelstein*, 526 F.2d 517, 526-27 (2d Cir. 1975), *cert. denied* sub nom. *Scardino v. United States*, 425 U.S. 960 (1976); see generally *United States v. Maze*, 414 U.S. 395 (1974). Similarly, with respect to the wire fraud statute, 18 U.S.C. § 1343, the Government need only show that a fraudulent scheme existed and that the participants used interstate transmission facilities. *United States v. Houlihan*, 332 F.2d 8, 13 (2d Cir. 1964), *cert. denied*, 379 U.S. 828 (1965). Corey does not seriously challenge the sufficiency of the evidence in this regard; at any rate, as indicated in the statement of facts, the scheme that Corey initiated and operated was extraordinarily fraudulent in nature, and in the course of that scheme he and his co-defendants caused the mail to be used on numerous occasions to carry fraudulently inflated invoices and to plan the meetings. See p. 6, *supra*.

The cases upon which Corey relies are wholly inapposite. In *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973), the Court held simply that a federal crime based upon an interstate element could not be "created" by arranging to have a federal undercover operative receive a telephone call across state lines. Here, of course, no undercover agent ever dealt with Corey, whose use of interstate facilities was solely at his own choice or that of his co-schemers. In *United States v. Brecht*, 540 F.2d 45 (2d Cir. 1976), *cert. denied*, — U.S. —, 97 S. Ct. 1160 (Feb. 22, 1977), this Court interpreted a wholly separate and different statute from those involved here—that is, the travel act, 18 U.S.C. § 1952—not to apply when the predicate state crime was commercial bribery. The applicability of that decision, which was based solely upon the legislative history of that particular statute, to prosecution under a wholly separate statute, is mystifying. Finally, *United States v. Regent Office Supply Co., Inc.*, 421 F.2d 1174 (2d Cir. 1974), involved a case where the showing of a fraudulent scheme was insufficient—hardly

the case here, where Hartz was actually defrauded of hundreds of thousands of dollars.

POINT III

The Conspiracy Charge Was Properly Submitted to the Jury.

Corey's final claim is that the evidence demonstrated two conspiracies, rather than one, and that thus his conviction on the conspiracy count should be reversed. There is no merit to this claim.

First, of course, the evidence was more than sufficient to permit the jury to find one conspiracy. Corey's conduct at Hartz Mountain was a sustained and continuing pattern the sole object of which was to permit him to bilk his employer. As such, even though Krasner did not deal directly with Barney in their separate aspects of the fraud, there were nonetheless present the unifying criteria that permitted the jury to conclude that a single conspiracy existed. See *United States v. Bernstein*, 533 F.2d 775, 791-94 (2d Cir.), *cert. denied*, — U.S. —, 97 S.Ct. 523 (Dec. 6, 1976); *United States v. Robinson*, 543 F.2d 951, 960 (2d Cir. 1976); *United States v. Steinberg*, 525 F.2d 1126 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).

Furthermore, as this Court has noted on numerous occasions, the test to be determined is not simply whether there were in fact two conspiracies or one, but rather whether the variance (if any) prejudiced the defendant. *United States v. Head*, 546 F.2d 6, 8 (2d Cir. 1976), *cert. denied sub nom. Wheaton v. United States*, — U.S. —, 97 S.Ct. 1551 (March 21, 1977); *United States v. Ricco*, 549 F.2d 264, 270 (2d Cir. 1977); *United States v. Toliver*, 541 F.2d 958, 963 (2d Cir. 1976); *United States v. Chong*, 544 F.2d 58, 66 (2d Cir. 1976); *United*

States v. Miley, 513 F.2d 1191, 1207-08 (2d Cir. 1975), *cert. denied*, 423 U.S. 892 (1976). In this case, even if the Barney and Krasner elements of Corey's fraud were separate, he was clearly not prejudiced by their joinder. Indeed, in this respect, this Court's decision in *United States v. Sir Kue Chin*, 534 F.2d 1032 (2d Cir. 1976), is dispositive. In that case, this Court held that even if two aspects of the defendant's conduct constituted separate conspiracies, it was entirely proper to try them together if they met the rather liberal joinder provisions of F. R. Crim. P. 8(a), authorizing a joint trial "if the offenses charged . . . are of the same or similar character or are based . . . on two or more acts or transactions connected together or constituting parts of a common scheme or plan." The Barney and Krasner were clearly of a similar—if not identical—nature. Indeed, had either of them been tried separately, the other would surely have been admissible as a similar act, see pp. 10-13, *supra*; *United States v. Sir Kue Chin*, *supra*, 534 F.2d at 1034. Finally, of course, the difficulty of joining several conspiracies together is the danger that the jurors will be unable to focus on each defendant and fairly calculate the evidence bearing on his guilt. *United States v. Miley*, *supra*, 513 F.2d at 1208; *United States v. Bertolotti*, 529 F.2d 149, 157-58 (2d Cir. 1975). Here, Corey was on trial by himself. Indeed, as this Court noted in *United States v. Sir Kue Chin*, *supra*, 534 F.2d at 1035, there is simply no precedent for the proposition that the single/multiple conspiracy analysis applies at all to trial of a single defendant.*

* Corey claims that "a charge on multiple conspiracies should have been given as requested." As *Sir Kue Chin* specifically notes, such an instruction would have been "improper" under the circumstances. *Id.* at 1035 n.*.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Frederick T. Davis being duly sworn,
deposes and says that he is employed in the office of the
United States Attorney for the Southern District of New
York.

That on the 3 day of Oct 1977
he served a copy of the within *sub*
by placing the same in a properly postpaid franked envelope addressed:

Dr. J. A. L. E. Jr.
225 Broadway
New York NY
10007

And deponent further says that he sealed the said envelope
and placed the same in the mail chute drop for mailing at
One St. Andrew's Plaza, Borough of Manhattan, City of
New York.

Frederick T. Davis

Sworn to before me this

3 day of Oct 1977

Jeannette Ann Gray
JEANNETTE ANN GRAY
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979